A **MAHABUILDERS SDN BHD**

v.

FOO SEE HAN

B HIGH COURT MALAYA, JOHOR BAHRU
GUNALAN MUNIANDY JC
[ORIGINATING SUMMONS NO: 24M-212-05-2013]
2 JANUARY 2014

C ***LAND LAW:*** *Caveats - Wrongful lodgement - Removal of - Inordinate delay to pursue claim - Whether fatal for continued existence of caveat on land - Whether caveator had caveatable interest - Whether caveator disclosed serious questions to be tried - Whether caveat should be removed - National Land Code, ss. 323(1)(a), (b), 327 & 329*

D ***LAND LAW:*** *Charge - Registration - Registration of charge prior to lodgement of caveat - Whether conferred chargee with indefeasible title - Whether bona fide purchaser for value without knowledge of caveator's interest acquired good title - Whether purchaser's rights and interest superseded caveator's claim - Whether caveat should be removed - National Land Code, s. 340*

E The plaintiff purchased a piece of land (the subject land) at a sale by public auction. The land was originally registered in the name of one Tetap Meriah Sdn Bhd ('TM') and was charged to OCBC Bank Bhd ('OCBC'). There was a 25 storey building known as "Pacific Mall" erected on the subject land. The proclamation and conditions of sale F excluded from the sale by public auction certain identified units in the Pacific Mall. The plaintiff paid the 10% deposit of RM3,132,000 on 20 September 2012 while the balance of RM28,188,000 was paid on 16 January 2013. The defendant lodged a private caveat on the subject land on 26 September 2012 under s. 323 of the National Land Code G ('NLC') on the ground that the defendant had entered into a sale and purchase agreement dated 10 April 1995 ('SPA') with TM to purchase an office lot which was not among the units excluded from the proclamation and conditions of sale. TM was subsequently wound-up on 20 September 2007 and a private liquidator was appointed to manage its affairs. The plaintiff applied for the removal of the said caveat under H s. 327 of the NLC. The plaintiff argued that according to the contract for sale, the period for completion of construction and delivery of vacant possession of the subject property to the defendant was 36 months. Therefore, the defendant's cause of action against TM arose on 10 April 1998. However, since up to date no action had been commenced against I TM for specific performance under the SPA, any claim made by the defendant would be statute barred by virtue of s. 6(1)(a) of the Limitation Act 1953. Moreover, the plaintiff argued that since TM had been wound up on 20 September 2007, it was unlikely for the defendant

to obtain an order for specific performance of the SPA against the liquidator of an insolvent company. The issues that arose for consideration, *inter alia*, were (i) whether the delay in commencing an action to enforce the alleged claim was fatal to the continued existence of the caveat on the subject land; (ii) whether OCBC's title on the subject land was indefeasible; (iii) whether the defendant had any caveatable interest; (iv) whether there was any serious questions to be tried; and (v) whether the caveat should be removed.

Held (allowing plaintiff's application with costs):

(1) The claim for an order of specific performance would be barred by the equitable doctrine of laches. On the facts, the defendant was guilty of laches in view of his inordinate delay in pursuing his claim. The caveat lodged by the defendant on 26 September 2012 was defeated by the duly registered charge of OCBC. OCBC upon registration of the charge, free from any claim, including that of the defendant, was conferred with an indefeasible title under s. 340 of the NLC. (paras 20 & 21)

(2) As the title of the OCBC was indefeasible, the plaintiff as a *bona fide* purchaser for value without notice of the defendant's interest had acquired a good title and rights to the subject land. The plaintiff's rights and interest superseded the purported claim of the defendant which was defeated by the registration of the charge some 14 years before the lodgement of the defendant's private caveat. (para 22)

(3) The defendant had failed to satisfy the onus cast on him to demonstrate that he had a caveatable claim to title or registrable interest under s. 323(1)(a) or (b) of the NLC to qualify him to enter the private caveat on the subject land. Even if he had such a claim to title or registrable interest, the delay in commencing an action to enforce the alleged claim was fatal to the continued existence of the caveat on the subject land. The evidence produced to support the defendant's claim for the entry of the caveat failed to disclose any serious questions to be tried. (para 23)

(4) There were no grounds sufficient in law for the caveat to remain on the register. The caveat was thus ordered to be removed under s. 327 of the NLC at the instance of the plaintiff, who was a *bona fide* purchaser for value without any knowledge of the defendant's claim and thus, an aggrieved party by reason of the continued existence of the caveat. As for damages, the plaintiff was an aggrieved party and was entitled to compensation for wrongful entry or continued existence of a private caveat pursuant to s. 329(1) of the NLC. (paras 23 & 24)

Case(s) referred to:

Bank Bumiputra Malaysia Bhd v. Mahmud Hj Mohamed Din & Anor [1989] 1 CLJ 1048; [1989] 1 CLJ (Rep) 326 HC ***(refd)***

Hew Sook Ying v. Hiw Tin Hee [1992] 3 CLJ 1325; [1992] 1 CLJ (Rep) 120 SC ***(refd)***

Lim Ah Moi v. AMS Periasamy Suppiah Pillay [1997] 3 CLJ 629 CA ***(refd)***

Lindsay Petroleum Co v. Hund [1874] LR 5 PC 221 ***(refd)***

Murugappa Chettiar Lakshmanan (Wasi Tunggal Harta Pesaka MRL Murugappa Chettiar, Simati) v. Lee Teck Mook [1995] 2 CLJ 545 CA ***(refd)***

Tai Lee Finance Co Sdn Bhd v. The Official Assignee Of The Property Of Ngan Kim Yong & Ors [1983] 1 CLJ 183; [1983] CLJ (Rep) 387 FC ***(refd)***

Teo Ai Choo v. Leong Sze Hian [1982] 1 LNS 122 HC ***(refd)***

Legislation referred to:

Limitation Act 1953, s. 6(1)(a)

National Land Code, ss. 256, 323(1)(a), (b), 327, 329(1), 340(2)

For the plaintiff - CH Ng; M/s Ng, Fan & Assocs

For the defendant - BH Ang (RC Lim with him); M/s Ang & Company

Reported by Sandra Gabriel

JUDGMENT

Gunalan Muniandy JC:

[1] This is an application by the plaintiff made pursuant to s. 327 of the National Land Code ('NLC') for an order, *inter alia* for the removal of a private caveat lodged by the defendant on a piece of land known as Geran 332240, Lot 32443, Bandar Johor Bahru, District of Johor Bahru ('the subject land'). The subject land was purchased by the plaintiff at a sale by public auction conducted by the Johor Bahru High Court ('JBHC').

Salient Facts

[2] The subject land is registered in the name of one Tetap Meriah Sdn Bhd ('TM') and was charged to OCBC Bank Berhad ('OCBC') *vide* a charge registered on 13 April 1998.

[3] A 25-storey retail-cum-office building known as "Pacific Mall" was erected on the subject land. An order for sale of the subject land was granted by the JBHC pursuant of s. 256, NLC. Upon orders given under summons for directions dated 6 April 2012 and 17 August 2012, the subject land was sold by public auction conducted by the JBHC on 20 September 2012 to the plaintiff at a price of RM31,320,000.

[4] The proclamation and conditions of sale excluded from the sale by public auction certain identified units in the Pacific Mall as stated therein.

[5] The plaintiff paid the 10% deposit of RM3,132,000 on 20 September 2012 while the balance of RM28,188,000 was paid on 16 January 2013. The defendant lodged a private caveat on the subject land on 26 September 2012.

[6] According to the Form 19B, s. 323, NLC for entry of the private caveat, the ground and basis for lodgement of the said caveat is that the defendant had entered into a sale and purchase agreement ('SPA') dated 10 April 1995 with TM to purchase an office lot known as Unit 1.57, First Floor, Pacific Mall. This particular unit was not among the units excluded from the proclamation and conditions of sale.

[7] TM was wound-up on 20 September 2007 and a private liquidator was appointed to manage its affairs.

[8] The plaintiff's solicitors *vide* two letters dated 31 January 2013 and 21 February 2013 to the defendant's solicitors demanded removal of the said caveat but the defendant failed to comply with the demand. However, up-to-date no suit or action has been commenced by the defendant against TM, OCBC or the plaintiff to enforce its claim to the subject land. The present action was filed by the plaintiff on 28 April 2013, some eight months after lodgement of the caveat, seeking the removal of the caveat and for damages suffered to be assessed.

The Law On Removal Of Private Caveats

[9] The governing law is s. 327, NLC which provides that:

> 327. Removal of private caveats by the Court
>
> (1) Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court (acting, if the circumstances so require, *ex parte*) may make such order on the application as it may think just.
>
> (2) The Registrar shall, on being duly served with any order under this section for the removal of a caveat, cancel the entry thereof on the register document of title, and note thereon the reason for the cancellation and the date thereof.
>
> (3) Every cancellation under sub-section (2) shall be signed and sealed.

[10] In the Court of Appeal case of *Murugappa Chettiar Lakshmanan (Wasi Tunggal Harta Pesaka MRL Murugappa Chettiar, Simati) v. Lee Teck Mook* [1995] 2 CLJ 545; [1995] 1 MLJ 782, the principles relating to the entry and removal of private caveats under the provisions of the NLC have been summarised. Gopal Sri Ram JCA (as he then was) remarked:

> The principles formulated in Luggage Distributors as applied to the present appeal require an investigation into the following matters. First, whether the respondent, on the material set out by him in his application under s. 323(1) of the Code, has disclosed a caveatable interest. Secondly, if he has established a caveatable interest, then, whether the evidence he produced before the learned judicial commissioner in support of his claim to that caveatable interest discloses a serious question to be tried. Lastly, if the first two questions are resolved in the respondent's favour, then, whether the balance of convenience, or more appropriately, the balance of justice, lies in favour of the caveat remaining on the register pending the disposal of his suit.

[11] On the issue of a serious question to be tried, it is trite law that if a caveator fails to commence action timeously to enforce his claim relating to the land caveated, the caveat is liable to be removed forthwith. In the Singapore High Court case of *Teo Ai Choo v. Leong Sze Hian* [1982] 1 LNS 122; [1982] 2 MLJ 12, a delay of 11 months from the date the caveat was lodged during which period no action was filed by the caveator, was held to be sufficient as the sole factor for removal of the caveat. Sinnathuray J held, *inter alia*:

> First, I accept the decision in *Plimmer Bros. v. St. Maur*. In that case, Stout, CJ in New Zealand, on an application to remove a caveat, on facts similar to the present case, where the defendant had commenced no action against the plaintiff relating to the land in respect of which a caveat was lodged, referred to several reported cases and said:
>
> > It was his duty to commence an action promptly if he considered himself entitled to specific performance. ... Here nothing was done for nearly sixteen months, and then, and still no action has been commenced. In my opinion an action for specific performance under such circumstances would be hopeless, and a caveat under such circumstances must be deemed vexatious ... in my opinion, to prevent a man dealing with his property after such a long delay is so inequitable that the court will not lend its assistance to such a proceeding.
>
> ...
>
> In this case on the facts before me I find that there has been inordinate and inexcusable delay. The dispute between the parties has arisen from an agreement for sale and purchase of a house in Serangoon Garden signed on September 1, 1979. It was not till 21 months later that a caveat was lodged on June 11, 1981. Then, from this date to the date of the hearing of this application on May 7, 1982, no action has been commenced by the defendant against the plaintiff in respect of the dispute, a lapse of 11 months. In these circumstances, having regard to the foregoing, on the ground of delay alone, the caveat must be removed forthwith.

[12] The above decision has been cited with approval in several Malaysian cases. The Court of Appeal in *Lim Ah Moi v. AMS Periasamy Suppiah Pillay* [1997] 3 CLJ 629; [1997] 3 MLJ 323 explained the rationale for the court's insistence on prompt disposal of caveats as follows (per Gopal Sri Ram JCA (as he then was)):

> It is well settled that a caveat acts as a statutory injunction which fetters a registered proprietor from dealing with his property and exercising all the rights conferred upon him by the Code. Because of its far-reaching effect, it is vital that claims made by a caveator are enforced by action without undue delay.
>
> Lord Diplock in *Eng Mee Yong & Ors v. Letchumanan* [1979] 1 LNS 18 put the matter in this way:
>
> > ... Once the caveatee has met the first requirement of satisfying the court that the claim on which his caveat is based does raise a serious question to be tried, the balance of convenience would in the normal way and in the absence of any special circumstances be in favour or leaving the caveat in existence *until proceedings, brought and prosecuted timeously by the caveator, for specific performance of the contract of sale which he alleges had been tried*.
>
> An illustration of the application of this principle is to be found in the case of *Teo Ai Choo v. Leong Sze Hian* [1982] 2 MLJ 12 where Sinnathuray J directed the removal of a caveat because of a delay of 11 months during which period no action had been filed. I emphasise the fact that delay was the sole reason for the removal of caveat in that case.

[13] The Supreme Court in *Hew Sook Ying v. Hiw Tin Hee* [1992] 3 CLJ 1325; [1992] 1 CLJ (Rep) 120; [1992] 2 MLJ 189, where *Teo Ai Choo* (*supra*) was cited with approval, held that in order to establish a caveatable claim to title to or registrable interest in land under s. 323(1), NLC, it is a must for the caveator to file a claim within a reasonable time for adjudication. Mohamed Azmi SCJ held:

> In an application to remove a private caveat under s. 327 of the NLC the principle laid down by the Privy Council in *Eng Mee Yong & Ors v. Letchumanan* has been consistently applied by the courts in this country. In order to succeed the caveator must establish two ingredients, failing which, the caveat will not be allowed to continue. At p. 215, Lord Diplock has this to say:
>
> > This is the nature of the onus that lies upon the caveator in an application by the caveatee under s. 327 for removal of a caveat: he must first satisfy the court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and, having done so, he must go

A on to show that on the balance of convenience it would be better to maintain the status quo until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

…

B In our opinion as between the applicant/purchaser and the caveator/third party, to establish a caveatable claim to title or registrable interest in land under s. 323(1) of the NLC, it essential for the caveator to have a claim filed or to be filed within reasonable time for adjudication. It is only on this basis that the principle enunciated in C *Eng Mee Yong* can be applied. Consequently, on an application for extension or to set aside the caveat, it is incumbent on the caveator to satisfy the court that he has such a claim before he proceeds to show that his said claim to title or registrable interest does raise a serious question or issue to be tried, and further on balance of convenience it would be better to maintain the *status quo* pending the trial of the D action. …

Further, even assuming for one moment that the caveator had a caveatable claim to title or registrable interest, he should not delay in filing his claim in court on the alleged claim. In the Singapore case of *Teo Ai Choo v. Leong Sze Hian*, it was held that delay is fatal where at E the hearing of an application to remove the caveat no writ was yet filed.

[14] On the indefeasibility of the title conferred on a registered chargee, from whom the plaintiff acquired good title to the subject property, the F Federal Court in *Tai Lee Finance Co Sdn Bhd v. The Official Assignee Of The Property Of Ngan Kim Yong & Ors* [1983] 1 CLJ 183; [1983] CLJ (Rep) 387; [1983] 1 MLJ 81 held:

(1) Upon registration of a charge the law confers indefeasible title in the chargor but this can be defeasible in the cases provided under G subsection (2) of section 340 of the National Land Code, including fraud;

(2) the law is settled that while section 340 makes it abundantly clear that the title or interest of a registered proprietor, which includes a charge, shall be indefeasible, such title or interest shall not be H indefeasible, by reason of subsection (2) of section 340 of the Code in a case of actual fraud.

[15] The position in law is, thus, that the registered chargee acquires an indefeasible title to the land, which shall only become defeasible under the exceptions set out in s. 340(2) NLC. In the absence of the I aforesaid exceptions, the registered charge would override other unregistered interests and confer on the chargee an unfettered right to enforce the charge in accordance with s. 256 NLC to protect its interests.

Finding Of The Court

[16] The basic and foremost contention of the plaintiff was that the defendant as the caveator had failed to raise a serious question to be tried on the evidence presented in support of the entry of the caveat under s. 323(1) NLC that would warrant the caveat to be maintained on the register.

[17] Having lodged the private caveat on 26 August 2013, the defendant had after a lapse of more than 12 months, failed to institute any action to enforce his claim to the subject property against the vendor, the chargee or the purchaser (plaintiff). Based on settled law as adverted to, it is paramount for the defendant as caveator to timeously file an action for specific performance of the contract of sale on which the entry of the caveat was grounded, failing which the caveat ought to be removed forthwith. A lapse in excess of 12 months to do so was clearly sufficient ground and justification by itself for the caveat to no longer remain on the register.

[18] The defendant entered into a sale and purchase agreement ('SPA') with the vendor ('TM') on 10 April 1995. Under the contract of sale, the period for completion of construction and delivery of vacant possession of the subject property was 36 months, ie, on or before 9 April 1998.

[19] The plaintiff contended that the defendant's cause of action against TM arose on 10 April 1998 but no action whatsoever has been instituted to date against TM for specific performance of the said SPA. As such, more than 15 years five months have lapsed since accrual of the defendant's cause of action against TM on 10 April 1998. Any claim by the defendant would now be clearly statute barred by virtue of s. 6(1)(a) of the Limitation Act 1953 as for an action founded on contract the limitation is six years from the date of accrual of the cause of action. Moreover, TM had been wound up on 20 September 2007 which rendered it most unlikely for the defendant to obtain an order of specific performance of the SPA dated 10 April 1995 against the liquidator of an insolvent company.

[20] It was also rightly contended by the plaintiff that as the defendant was guilty of laches in view of his inordinate delay in pursuing his claim, the claim for an order of specific performance would be barred by the equitable doctrine of laches. Reference was made to the judgment of the Judicial Committee of the Privy Council in *Lindsay Petroleum Co v. Hund* [1874] LR 5 PC 221 as follows:

> The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which

A might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be
B just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course
C or the other, so far as relates to the remedy.

[21] Lastly, the caveat lodged by the defendant on 26 September 2012 was defeated by the duly registered charge of OCBC dated 13 April 1998. At the time of entry of the caveat, the subject land had been
D lawfully sold by public auction to the plaintiff pursuant to an order for sale granted by the High Court. The chargee ('OCBC') upon registration of the charge, free from any claim, including that of the defendant, was conferred with an indefeasible title under s. 340 NLC as the exceptions to indefeasibility did not, indisputably, apply to the instant
E case. The plaintiff cited in support *Bank Bumiputra Malaysia Bhd v. Mahmud Hj Mohamed Din & Anor* [1989] 1 CLJ 1048; [1989] 1 CLJ (Rep) 326; [1989] 1 MLJ 381 where Peh Swee Chin J (as he then was) stated:

F It was only too obvious to the court that the ground of the Intervener's claim was one of priority over the charge in question as registered on the title which she had agreed to purchase by the sale agreement because she had bought the land long before the charge was registered, in other words, *qui prior est tempore potior est jure*, ie he who is earlier in time is stronger in law.

G Here, the chargee, being a registered chargee, had attained, as regards its registered interest, an indefeasible title against the world save for a few exceptions as set out in s. 340 of the National Land Code such as fraud, misrepresentation etc to which the chargee was a party or privy, and which did not apply to the facts of the instant case.

H When the exceptions in the said s. 340 do not apply as they did not apply to the instant case, the supervening title would defeat a prior equitable right or interest: *Ong Chat Pang v. Valliappa Chettiar*. The chargee, to quote a familiar expression, had therefore succeeded in the scramble to get on the register and had therefore emerged victorious.

I **[22]** As the title of the chargee was indefeasible under s. 340 NLC and free from or encumbered by any prior claim, whether legal or equitable, the plaintiff, as a *bona fide* purchaser for value without notice of the defendant's interest, had acquired a good title and rights to the

subject land. Its rights and interest superseded the purported claim of the defendant which was defeated by the registration of the charge some 14 years before the lodgement of the defendant's private caveat.

Conclusion

[23] On the foregoing grounds, I held that the defendant as the caveator had failed to satisfy the onus cast on him to demonstrate that he had a caveatable claim to title or registrable interest under s. 323(1)(a) or (b) NLC to qualify him to enter the private caveat on the subject land. Even if he had such a claim to title or registrable interest, the delay in commencing on action to enforce the alleged claim was fatal to the continued existence of the caveat on the subject land. It was patently clear that the evidence produced in support of the alleged claim of the defendant for entry of the caveat failed to disclose any serious question to be tried. In the circumstances, I held in conclusion that there were no grounds sufficient in law for the caveat to remain on the register and ordered it to be removed forthwith under s. 327 NLC at the instance of the plaintiff who was a *bona fide* purchaser for value without any knowledge of the defendant's claim and thus, an aggrieved party by reason of the continued existence of the caveat.

[24] As for damages, the entitlement of the aggrieved party to compensation for wrongful entry or continued existence of a private caveat is provided for in clear and mandatory terms in s. 329(1) NLC which states:

> 329. Compensation for wrongful caveats, and limitation on repeated applications
>
> (1) Any person or body who, wrongfully or without reasonable cause, secures the entry of, or fails to withdraw, any private caveat shall be liable to pay compensation to any person or body who thereby suffers any damage or loss.

The defendant had failed or refused to withdraw the caveat despite notices of demand to do so having been issued by plaintiff's solicitors. I, therefore, ordered compensation to be paid to the plaintiff under s. 329(1) NLC to be assessed by the Registrar.

[25] Costs was ordered in the sum of RM2,000 against the defendant to be paid to the plaintiff.